

Highlights of Recent Developments in Estates and Trusts

Presented by: Lindsay Ann Histrop, LL.M
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Ontario Disability Support Program (ODSP)

- *Ontario Disability Support Program Act, Income Support*
- Purpose is to help people with disabilities who are in financial need pay for basic living expenses
- To be eligible, person must be:
 - at least 18 years old,
 - an Ontario resident,
 - meet the program's definition of a person with a disability or be a member of a Prescribed Class, and
- Meet severe income and asset limit requirements

ODSP –April 18, 2018 Proposed Amendments

- Ontario Regulation 281/18 to amend O. Reg. 222/98
- The original amendments would have changed:
 - Investments in RRSP and TFSA accounts would be exempt from asset limit
 - The \$10,000 limit on gifts in any 12-month period would be removed, allowing unlimited gifts and distributions from an estate or trust without affecting income limit
 - Income threshold limits would be increased
- The amendments would have been effective beginning September 1, 2018

ODSP – Amendments Cancelled

- On July 31, 2018, Ontario government announced that it would not proceed with certain initiatives in the previous government's 2018 Budget
- Proposed amendments have been cancelled
- Government July 31, 2018 press release said, "Over the next 100 days, Ontario will work on a plan to reform social assistance..."
- What will the new plan look like?

<https://news.ontario.ca/mcys/en/2018/07/helping-people-with-a-plan-to-reform-social-assistance.html>

ODSP: Henson Trusts and Inheritance Trusts

- Henson trusts are discretionary trusts that can be used to control the amount of income (and assets) included in the hands of a beneficiary for the purpose of qualifying for ODSP and other benefits
- Henson trusts will continue to be an important tool for families supporting an ODSP recipient
- For the time being, trust and estate distributions and gifts continue to be limited to \$10,000 in any 12-month period unless the payments are used to pay for certain expenses
- Inheritance Trust – up to \$100,000 of inherited funds may be contributed without losing ODSP benefits

Trust Reporting:

Trust Tax Return Reporting Developments

- February 27, 2018: the Department of Finance released its 2018 Federal Budget, which contained increased tax reporting requirements for trusts
- July 27, 2018: the Department of Finance released draft tax legislation that would implement the new trust reporting requirements
- The new trust reporting rules will be effective for tax years that end after December 30, 2021 (e.g., beginning for the December 31, 2021 tax year)
- Inevitable that some trustees will not be aware of these new rules

Trust Reporting: Section 150 and Historic CRA Policy

- Subsection 150(1.1), of the *Income Tax Act*: a trust is not required to file a tax return if it has no tax payable
- CRA's T3 Guide: a trust tax return is only required if the trust has any of:
 - tax payable,
 - a taxable capital gain,
 - income more than \$500,
 - a benefit to a beneficiary of more than \$100,
 - income allocated to a non-resident,
 - holds property subject to 75(2),
 - or is a deemed resident trust,
- Typically trusts with no income might not file until 21st year (e.g., principal residence trust; estate freeze trust).

Trust Reporting: New Subsection 150(1.2)

- New subsection 150(1.2): any “express trust” that is resident in Canada or deemed resident in Canada must file a T3 return
- “Express trust” is not defined but is suggested to arise from the instructions of a settlor or testator, as opposed to an equitable trust imposed by a court
- Will a bare trust be required to file?
- S. 104(1) deems a trust to not include arrangements where the trust is considered to act as agent for the beneficiaries – but it is not at all clear if/when a bare trust must file

Trust Reporting: Exceptions

- Subsection 150(1.2)- Trusts that are exempt from filing a return:
 - a) Those in existence for less than 3 months
 - b) Those having less than \$50,000 of liquid assets only throughout the year
 - d) A registered charity or not-for-profit club under 149(1)(l)
 - e) A mutual fund trust
 - i) A graduated rate estate
 - j) A qualified disability trust
 - k) An employee life and health trust
 - m) A DPSP, RSP, RDSP, RESP, RPP, RRIF, RRSP, or TFSA

Trust Reporting: Penalties

- New subsections 163(5) and (6) impose a penalty on:
 - A person who knowingly makes a false statement or omission in a return, or
 - A person who fails to file a return for a trust that is not exempt under subsection 150(1.2)
- The penalty is equal to the greater of (a) \$2,500 and (b) 5% of the highest fair market value at any time of all the property held by the trust

Trust Reporting: Section 204.2 of the Regulations

- New section 204.2 of the Regulations requires a person acting in a fiduciary capacity (the trustee) to provide:
 - the name, address, date of birth, jurisdiction of residence, and tax identification numberfor each
- trustee, beneficiary, settlor, and person who can exert influence over the appointment of income or capital of the trust (e.g., a “protector”)

Trust Reporting: Section 204.2 of the Regulations

- The requirement for information in respect of the beneficiaries is met if
 - (a) information is provided for each beneficiary whose identify is known or ascertainable with reasonable effort, and
 - (b) sufficiently detailed information to determine with certainty whether any particular person is a beneficiary is provided
- Where the class of beneficiaries is extensive, this will be an onerous responsibility for trustees

Importance of Confirming Domicile

Sato v Sato, 2018 BCCA 287

- Testator born in Japan, obtained a BSc and MBA in BC, worked in BC, Ontario, Cayman Islands, Tokyo, Guernsey, and finally Luxembourg
- Testator executed his last will in BC in 2011, while visiting, leaving estate to sisters
- Testator subsequently married in Luxembourg in 2013
- As of 2013, most assets and friends were in Luxembourg and he filed taxes there
- Testator died in Japan in 2015 seeking medical treatment
- Under BC's former *Wills Act*, marriage automatically revoked a will (the *Act* is since amended so this is no longer true)

Importance of Confirming Domicile

Sato v Sato, 2018 BCCA 287

- If Testator was domiciled in BC in 2013, his will would have been revoked, and estate would pass to widow on intestacy; domicile in Luxembourg, would not revoke will
- Domicile determined by both residency and intention
- Court considered Testator's 1999 CRA residency determination form stating intention to retire in Canada – trial judge called this the “Key Document”
- Court concluded Testator's domicile in 2013 was BC
- As a result, Testator's BC will was revoked, and intestacy rules applied
- Shows the importance of written and verbal expressions of domiciliary intention in determining domicile

Post mortem interest on unpaid legacies

Rivard v Morris, 2018 ONCA 181

- Testator's will favoured son over two daughters, giving son residue including 3 valuable, appreciating farms
- Daughters given legacies of \$530,000 each
- Daughters challenged will unsuccessfully and costs were awarded against them
- Daughters then sought interest to be paid on their cash legacies
- 3 Year delay in payment of legacies was caused, at least in part, to challenge by Daughters (who also acted as estate trustees)

Post mortem interest on unpaid legacies

Rivard v Morris, 2018 ONCA 181

- Court ruled that common law “rule of convenience” applied to allow interest on cash legacies because they were payable with no conditions under the will
- Awarded 5% simple interest from the first anniversary of father’s death based on the rate of interest carried by the rule of convenience at common law
- Shows importance of testator addressing interest payments on legacies if delay in payment anticipated
- Son seeking leave to appeal to the SCC

Joint accounts and Resulting Trust disputes

Brathwaite v Harding, 2018 ONSC 2488

- Deceased added H as joint owner of bank account to allow H to provide assistance and pay for bills
- Deceased sold home and deposited proceeds in joint bank account
- Deceased gifted \$250,000 out of proceeds to B
- After Deceased's death, H withdrew \$250,000 from joint account
- B argued that H's withdrawal should be considered an asset of the estate on the principle of resulting trust

Joint accounts and Resulting Trust disputes

Brathwaite v Harding, 2018 ONSC 2488

- H had onus to show that proceeds were intended as a gift and to rebut the presumption of a resulting trust
- H presented Court with Deceased's authorization of joint account at Bank, evidence of Bank employee involved in opening joint account, and statements by Deceased made while alive
- Court satisfied with H's evidence that the joint account constituted a gift passing outside estate
- Shows the importance of documenting transferor's intention in writing when establishing joint accounts

Testamentary Freedom and Public Policy

Free Expression v McCorkill, 2015 NBCA 50

- Testator's will left residue of estate to a white supremacist organization in the US
- Discussion on public policy and what may be considered to be a violation of public policy in terms of estate planning
- Court found that communications of the residuary beneficiary were illegal and in violation of public policy
- Court ruled that bequest was invalid because the purpose and activities of the beneficiary organization contravened Canadian public policy
- Shows courts are prepared to interfere with testamentary freedom on general moral grounds

Obligation to Disclose Trust Interest to Beneficiary

Valard v Bird, 2018 SCC 8

- Bird required subcontractor to obtain a labour payment bond. Bond allowed work provider who was owed money by subcontractor to sue surety company.
- Subcontractor hired Valard to provide construction work. Subcontractor became insolvent, leaving Valard's invoices unpaid.
- Bird did not notify Valard of the bond.
- Valard asked Bird about bond and filed a claim outside of specified notice period. Surety company denied claim.
- Valard sued Bird for breach of trust

Obligation to Disclose Trust Interest to Beneficiary

Valard v Bird, 2018 SCC 8

- SCC held that bond created an express trust
- Beneficiary of trust has right to hold trustee accountable for administration of property and to enforce terms of trust
- In some circumstances, this right can only be exercised if the beneficiary is informed of the existence of the trust
- “In general, wherever ‘it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed’ of the trust’s existence, the trustee’s fiduciary duty includes an obligation to disclose the existence of the trust.”
- This principle is expected to be applied in the private trust context, raising the trustee’s responsibility to be proactive

Proprietary Estoppel

Cowper-Smith v Morgan, 2017 SCC 61

- Sister promised Brother that if he moved back to the family home and provided care for their aging mother, Sister would sell her share of mother's estate to Brother
- Sister reneged on her promise
- Trial Court found all elements of proprietary estoppel had been established:
 - Sister made the promise
 - Brother relied on the promise to move in with mother
 - Brother suffered as a result of his reliance leading to an unfair result

Proprietary Estoppel

Cowper-Smith v Morgan, 2017 SCC 61

- BC Court of Appeal ruled that proprietary estoppel could not be applied because Sister did not have an interest in the estate property when she made her promise
- SCC restored trial judge's decision and concluded that ownership at the time of representation is not a prerequisite to the doctrine of promissory estoppel
- As soon as G received interest in the property, promissory estoppel would attach
- Expect more disappointed beneficiaries to plead this remedy

Priority of CRA Over Other Claims in Insolvent Estate Re Evans Estate, 2018 NSSC 68

- Insolvent estate owed debts to creditors and CRA
- Under *Probate Act* (NS), tax debts appear to rank after certain other expenses including funeral expenses, probate taxes, and trustee and professional fees
- Common law also prioritizes funeral and testamentary expenses in insolvent estates
- Under *Income Tax Act* (Canada), tax debt must be paid or trustee is held personally liable

Priority of CRA Over Other Claims in Insolvent Estate Re Evans Estate, 2018 NSSC 68

- Court cited principle of Crown Prerogative, which presumes that government is not bound by statute unless otherwise expressly stated
- Principle of paramountcy – federal law takes priority over provincial law where there is a conflict
- Court ruled that income tax debt should be paid in priority to other debts, overruling probate court instructions
- Creates practical challenges for insolvent estates in debt to CRA if trustees, professionals and funeral cannot be paid from the estate assets

Uncertainty Leading to Invalidity of Multiple Wills

Milne Estate (Re), 2018 ONSC 4174

- Testator's Primary (probate) Will: "all property owned by me at the time of my death EXCEPT ... [certain named assets and] any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof". (emphasis added)
- Testator's Secondary (non-probate) Will: "all property owned by me at the time of my death INCLUDING ... [certain named assets and] any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof" (emphasis added)

Uncertainty Leading to Invalidity of Multiple Wills Milne Estate (Re), 2018 ONSC 4174

- Held Secondary Will covers ALL property of Testator
- Primary Will grants the executors the entire discretion to determine retroactively which assets are (not) vested under it
- Secondary Will found to be valid; Primary Will found to be invalid
- Primary Will found to lack certainty of subject matter
- Part of probate process is for the court to examine the validity of a will

Uncertainty Leading to Invalidity of Multiple Wills Milne Estate (Re), 2018 ONSC 4174

- “The testator must settle upon the Estate Trustees assets that are specifically identified or are *objectively* identifiable by reference to the intention of the testator and not the subsequent decision of the Estate Trustees.”
- Principle of certainty of subject matter offended
- Technique of excluding assets which do not require a certificate of appointment (probate) from the will to be probated is a commonly employed drafting style

Uncertainty Leading to Invalidity of Multiple Wills Milne Estate (Re), 2018 ONSC 4174

- “The Primary Will seeks to carve out a variable subset of the property that is and remains subject to the Secondary Will without subtracting such property from the secondary estate and to do so based upon the subsequent, subjective determinations of the Estate Trustees as to what is desirable. In my view, this cannot be done.” (emphasis added)
- “If multiple wills are to be employed ... the property that is subject to each must be ascertainable objectively based upon the expressed intent of the testator without regard to discretion of the Estate Trustees exercised afterwards.” (emphasis added)

Uncertainty Leading to Invalidity of Multiple Wills Milne Estate (Re), 2018 ONSC 4174

- Question remains, if the determination of assets disposed of under each Will was not expressly delegated to the discretion of the Estate, would the Will still be invalid on the basis that the subject was uncertain?
- Certainty dilemma best illustrated where the residual beneficiaries under the two Wills are different
- Meanwhile, countless multiple wills with similar language have successfully gone through the probate process in Ontario and Certificates of Appointment have been issued for only the intended “probate” will

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Highlights of Recent Tax-Related Cases

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Topics to Discuss

1. Introduction:
2. *Wheaton Precious Metals* Cases
3. *Gagliese* Case
4. *Landbouwbedrijf* Case
5. *Kau* Case

Wheaton Precious Metals Tax Cases

- The Canadian public company previously known as Silver Wheaton is in the business of providing financing to mining companies in return for a share of their production (a so-called “streaming company”)
- The CRA audited Wheaton and its wholly-owned Cayman subsidiary for the period 2010-2015, and reassessed on the basis that Wheaton had violated the Transfer Pricing Rules
- As a result, the Cayman income of \$715 million was attributed to the Canadian parent, which was assessed for \$310 million of taxes, interest and penalties

Wheaton Precious Metals Tax Cases...cont'd

- Wheaton made timely disclosures of the CRA proposals and actual reassessments, but management stated that the audit was not expected to have a material adverse effect on the company, and that the company's financial statements were in compliance with the International Financial Reporting Standards
- Immediately following the disclosure, the stock price fell about 20%
- Shareholder class actions were commenced in civil courts both in the U.S. and in Canada, seeking punitive damages of \$10 million, among other things

Wheaton Precious Metals Tax Cases...cont'd

- Wheaton's Annual Information Form filed with the OSC proclaimed that the "Corporation's profit is derived from its subsidiary, Silver Wheaton Cayman, which is incorporated and operated in the Cayman Islands, the Corporation's profits bear no income tax".

This is like waiving a red flag in front of the CRA bull



Wheaton Precious Metals Tax Cases...cont'd

- The allegations in the cases are that the Cayman company had inadequate substance to be able to conduct the business from which it claimed to be generating profits for itself as opposed to for its parent company in Canada
- The plaintiffs allege that Wheaton violated securities laws by failing to disclose material adverse facts about the company's business, operations, prospects and performance

Wheaton Precious Metals Tax Cases...cont'd

- The IFRS apparently requires a company to record as an uncertain tax-position liability in its financial statements an estimate of the obligations if it was “more likely than not” that the CRA audit would result in additional taxes
- In addition, the plaintiffs allege that management made false and negligent misrepresentations about the severity of the reassessments, inducing shareholders to buy its stock at inflated prices

Wheaton Precious Metals Tax Cases...cont'd

- What lessons can be learned from these cases ?
 - Compliance with the Transfer Pricing Rules is critical for any company with international operations
 - Public disclosure about tax minimization must be managed with an expectation that the CRA will read it and react
 - Even if the company believes it has a good defensible position, it must be conservative and realistic in representing the risks to the public
 - Tax issues are no longer a private matter for public companies

Rocco Gagliese Productions Inc. v. The Queen

When a company earns royalties, can it still claim the small business deduction from carrying on an active business ?

- Rocco Gagliese is a writer, performer and recorder of music for television programs; in fact he won an Emmy Award for his music
- He incorporated a company of which he was the sole shareholder, director and officer through which to produce his music and obtain limited liability protection

Rocco Gagliese Productions Inc. v. The Queen...cont'd

- He assigned to his corporation his rights to receive revenue in respect of the music he composed, performed or recorded
- When this revenue was received as “royalties” from the collecting agent SOCAN (the Society of Composers, Authors and Music Publishers), the CRA denied the corporation the small business deduction on the basis that it earned income from property (copyright in the music) and not from an active business (the provision of services)

Rocco Gagliese Productions Inc. v. The Queen...cont'd

- The Tax Court noted that this issue has come before the court because the CRA revoked its previous published position, which stated:
- *Although royalty income is generally from a source that is property, where it can be established that the royalty income is related to an active business carried on by the recipient corporation, or the recipient corporation is in the business of originating property from which the royalties are received, such income will be considered to be income from an active business. Therefore, if a company is in the business of composing music, the income it earns with respect to its copyrighted music would generally be considered active business income.*

Rocco Gagliese Productions Inc. v. The Queen...cont'd

- The Court found on the facts that Mr. Gagliese validly assigned to his corporation the rights to receive revenue from the music he wrote, performed or recorded
- Counsel for the taxpayer corporation argued that the corporation in fact carried on an active business, and that in any event it did not fall within the definition of an “investment business” which requires the principal purpose of the corporation to be the earning of income from property, which was not the case here

*Rocco Gagliese Productions Inc. v. The Queen...*cont'd

- Counsel for the Crown argued that the court must be bound by the legal character of the revenue: *royalties* come from the use of property
- However the Court found that the principal purpose of the corporation's business was to earn income from Mr. Gagliese's daily activities of originating and recording music tracks for individual television episodes
- Accordingly, it was carrying on an active business from providing services and, thus, was entitled to claim the small business deduction

Rocco Gagliese Productions Inc. v. The Queen...cont'd

- What we can learn from this case is that while the legal character of a payment is important, it will not govern the taxability, if the taxpayer can show that value was created from an activity that differed from the label that was assigned to the payment
- In addition, we are reminded that interpretations put forward by the CRA or withdrawn by them do not constitute the law, but only their views, which may be overturned by a court where the evidence is clearly in the taxpayer's favour

Landbouwbedrijf Backx B.V. v. The Queen

When a Dutch company realizes a capital gain from the sale of partnership interest in a Canadian farm, can it be liable for tax as a resident of Canada?

- The corporate taxpayer (“LB”) is a limited liability company incorporated under the laws of the Netherlands
- It disposed of its partnership interest in an Ontario farm, and the CRA assessed the capital gain under Part I as though it was a Canadian resident and also under Part XIV (branch tax) as though it was a non-resident

Landbouwbedrijf Backx B.V. v. The Queen...cont'd

- The original Dutch resident shareholders and directors of LB were Michiel Backx and his wife, Marian Backx
- When the Backx immigrated to Canada they formed a 51/49 partnership with LB to acquire the Ontario farm
- The Backx resigned as directors of LB in favour of Marian's sister, but remained as shareholders
- They also established an Ontario corporation, Backx Dairy Farms Limited ("BD"), to which LB transferred its 49% interest in the farm partnership for proceeds of \$4.5 million, paid by a note, resulting in a capital gain of \$1.7 million

Landbouwbedrijf Backx B.V. v. The Queen...cont'd

- The memorandum of agreement approving the transaction was signed by Marian's sister on behalf of LB
- BL followed the procedure under s.116 of the ITA disclosing the transaction and claiming the capital gain was tax exempt as being "treaty-protected property" under the ITA and the Canada-Netherlands Tax Treaty, on the basis that the farm partnership carried on a business and the capital gain realized on the transfer of the partnership interest was only taxable in the Netherlands

Landbouwbedrijf Backx B.V. v. The Queen...cont'd

- The Tax Court found that all the instructions for buying and selling the Ontario farm property came from the Backx in Canada, and that Marian's sister in the Netherlands was a mere nominee who carried out clerical and administrative functions on behalf of the Backx
- Marian's sister admitted that she had no experience in farming and no prior business experience. She accepted the title of director to assist her sister and brother-in-law, and received remuneration of €500 per year
- Moreover, the correspondence among the Backx, their Canadian and their Dutch advisors disclosed that the Backx assumed effective and independent control of LB- indeed most of the correspondence was not copied to Marian's sister

Landbouwbedrijf Backx B.V. v. The Queen...cont'd

- In analysing whether LB was a resident of Canada, the Court adopted the long-standing central management and control test (See the decision of the Supreme Court of Canada in *Garron Family Trust (Trustee of) v. R.*)
- While central management and control is usually found to reside in the Board of Directors, if significant management decisions are taken by a person who is not a director, the place where that person resides or operates may be determined to be the residence of the corporation
- The Court found that LB had not ceased to be a resident of the Netherlands; accordingly, it was a dual resident, in which case the “competent authorities” under the Treaty not the Court must resolve the conflict

Landbouwbedrijf Backx B.V. v. The Queen...cont'd

- What we learn from this case is that even with expert tax advice in both Canada and the Netherlands, it is possible to overlook the fundamental facts on how a corporation actually operates and the resulting tax risks
- One always needs to go back to “basics”
- In any cross-border transaction, one must be clear on where the parties are resident for tax purposes based on the actual facts, not just on the tax plan proposed by the advisors

Anibal Kau v. The Queen

When does a purchaser of real property from a vendor satisfy the test of making “reasonable inquiry” as to whether the vendor is a non-resident ?

- The taxpayer, Anibal Kau (“Kau”) purchased a Toronto condominium unit from a vendor with a California address for service
- No application was made for a section 116 clearance certificate from the CRA

Anibal Kau v. The Queen...cont'd

- The dispute arose from the assessment of the purchaser of 25% of the purchase price on the basis that the purchaser did not make “reasonable inquiry...to believe that the non-resident person was not resident in Canada”
- The Court carefully examined the evidence presented by the parties to determine whether the taxpayer met the statutory test
- Leading up to the closing, the taxpayer visited the condo and determined that the vendor did not live there, a tenant did, and that it was an investment property for the vendor
- In addition, the taxpayer’s lawyer found that the vendor’s address for service was in California

Anibal Kau v. The Queen...cont'd

- The vendor in front of a California notary declared (but did not solemnly swear) in an affidavit: “I am not a non-resident of Canada...”
- The taxpayer himself did not make enquiry as to the residency of the vendor; he did however hire a real estate lawyer to act for him, which presumably includes avoiding tax liability under the ITA
- The Court found that the lawyer knew about the California address for service for the vendor, the possession of the condo by a tenant not the vendor, the so-called “affidavit” – these should have been viewed as “red flags” to the lawyer to make further inquiries and dig deeper into the apparent facts

Anibal Kau v. The Queen...cont'd

- It was incumbent on the lawyer in these circumstances to make additional inquiries, such as asking for the permanent residential address of the vendor, not just the address for service, and for a copy of the vendor's driving license
- These and other inquiries might have led the lawyer to conclude that the taxpayer ought not to rely on the vendor's documents, and instead not close without the clearance certificate

Anibal Kau v. The Queen...cont'd

What can we learn from this case ?

- Even in apparently conventional purchase and sale transactions, the tax risks must be carefully evaluated
- Appropriate steps must be taken to mitigate such risks by examining the statutory exculpatory language, and using common sense and the perspective of how a court might look at the conduct of the taxpayer years after the event
- What needs to be done will always be dictated by the context of the law and the particular facts, but the approach to risk mitigation in the tax minefield should have the highest priority



Questions?

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Recent Developments Affecting Charities and Non-Profits

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September 20, 2018



Non-share Corporations to hold Personal Assets

- perpetual existence
- no twenty-one year rule
- avoid estate administration tax
- defer capital gains tax
- flexibility
- Lash case involving family dispute
- CRA position on members as shareholders and benefit issues
- need for tailor-made by-laws, “lease” payments, etc.

Charitable Donation “Schemes”

- previous jurisprudence says no credit or deduction for cash portion of “donations” under “buy-low donate high arrangements”
- arrangement treated as an “investment” rather than gift with donative intent
- recent *Cassan* decision of TCC reviews earlier cases and law and finds in favour of taxpayers to limited extent
- under appeal to FCA

Political Activity

- Harper government initiatives
- controversy
- public consultation
- report from committee
- government response and plan to amend legislation and administration
- Canada Without Poverty decision and uncertainty
- government will appeal
- draft legislation introduced on September 14, 2018 to amend ITA

“Social Investments” in Ontario

- *Charities Accounting Act*
- *Trustee Act*
- income tax issues
- program related investments (for tax purposes)
- guidance
- PGT

Remuneration Payable by Charities to Directors

- case law and practice of PGT in Ontario
- prohibition against payment to director in any capacity
- often misunderstood or overlooked
- attempt by PGT to provide relief
- regulation under CAA
- section 13 orders
- guidance from PGT
- restrictions
- PGT guidance

Current Issues With Respect to CNCA

- ongoing issues
- current situation
- implications

Current Status of ONCA

- further delay in implementation
- enactment of parts of ONCA by amendments to *Corporations Act*
- ongoing issues

Cultural Property

- valuation of cultural property
- *Heffel Gallery* case
- interpretation of “outstanding significance” and “national importance”

2018 Budget Changes

- changes dealing with gifts to foreign universities
- comparison to Canada - U.S. Treaty
- extended definition of “eligible donee” includes municipalities for relief from revocation tax

Miscellaneous

- gifts by executors
- ineligible individuals
- CRA website address required on official receipts
- valuation of gifts in kind
 - *Balkwill* case
 - duelling experts
 - bootlegging issue
- amendment of NPO tax exemption

Miscellaneous

...cont'd

- extended definition of “charitable purposes” in CAA
 - extends common law and income tax concept
 - PGT position
- disputes among directors and/or members
 - *Wall* case
 - *Mount Pleasant* case
 - others
- *Humboldt Broncos* case and crowdfunding

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Charities and Social Investments

The Charities and Social Investments Guidance is intended to provide general information and is not intended to be a substitute for legal advice. For legal advice, charities should consult their legal advisor.

The purpose of this guidance is to provide information that charities need to be aware of if they make a social investment.

A social investment seeks to achieve both the charity's purposes and a financial return.

Charities can make social investments under sections 10.2 to 10.4 of the *Charities Accounting Act*.

The provisions are designed to facilitate social investing by giving charities flexibility to invest funds in ways that allow them to further their charitable purposes. For example, joint projects, revenue participation, non-collateralized loans or other financial structures could be available to charities.

Ordinarily when a charity makes an investment, it must comply with the prudent investor rules under the *Trustee Act*. When a charity makes a social investment, the prudent investor rules are replaced with new statutory duties under the *Charities Account Act* which are discussed below.

Sections 27 to 29 of the *Trustee Act* contain the prudent investor rules. Most of these provisions do not apply to social investments, with the exception of subsections 27 (3) and (4).

- Subsection 27 (3) authorizes charities to invest in mutual funds, pooled funds or segregated funds under variable insurance contracts. For instance, a charity may pool their funds with other charities when making a social investment.

- Subsection 27 (4) authorizes charities that hold funds with a trust corporation as co- trustees to invest in a common trust fund that is maintained by the trust corporation.

When a charity is considering making a social investment it should decide whether the investment would be appropriate based on its charitable purposes and assets, the rules and duties that apply to social investing, the specific provisions of the charity's governing documents¹ and a director's or trustee's general fiduciary obligations.

If the charity is registered with the Canada Revenue Agency (CRA), it should also consider how CRA will view the investment. (see Canada Revenue Agency, page 8)

Social investing is available to charities regardless of how or when they were created. Charities established outside of Ontario or that have been federally incorporated may also be able to use the provisions if they are subject to Ontario jurisdiction.

What is a Social Investment?

A social investment means using a charity's funds to directly further its purposes and achieve a financial return. Social investments fall on a continuum ranging between charitable expenditures at one end and purely conventional investments at the other.

A 'financial return' is defined as achieving an outcome that is better for the charity in financial terms than expending all of the property that was invested. A 'financial return' is not required to be at market rates and depending on the terms of the investment, may not require a re-payment of the investment capital.

For example, a charity aimed at helping the poor is considering making a loan to another charity to help build apartments for the poor. Only a small part of the loan would be re-paid and no revenue would be generated. As the outcome

¹ Generally speaking, the governing document for a charitable trust is its deed of trust; for an unincorporated charitable organization, its constitution; and for an incorporated charity, its articles of incorporation, letters patent or the Act that established it.

would be better for the charity in financial terms than having spent all of the funds, the charity would be considered to have received a financial return.

Potential Restrictions on Social Investments

A charity's ability to make social investments may be restricted or excluded by the terms of its governing documents. If the governing documents expressly prohibit social investing, the charity may not undertake a social investment.

In some cases, a charity's governing document may stipulate how the charity is to invest its funds. For example, many charities incorporated in Ontario have a special provision that requires the organization to invest its funds pursuant to the *Trustee Act*. Restrictions or directions on how a charity is to invest its funds only apply to its conventional investments. These general restrictions do not apply to social investments because, under section 10.2(5) of the *Charities Accounting Act*, a social investment is not regarded as an investment for any other purpose.

Typically, foundations in Ontario have the following standard charitable purpose clause:

To receive and maintain a fund or funds and to apply all or part of the principal and income therefrom, from time to time, to charitable organizations that are also registered charities under the *Income Tax Act* (Canada).

Foundations operating with this clause only are not limited to funding a particular purpose or named charity. If a foundation that is a registered charity is not required to apply its funds to a particular charitable purpose or benefit a named charity, it can undertake social investments that directly further any charitable purpose as long as the recipients of the investment are registered charities under the *Income Tax Act* (Canada).

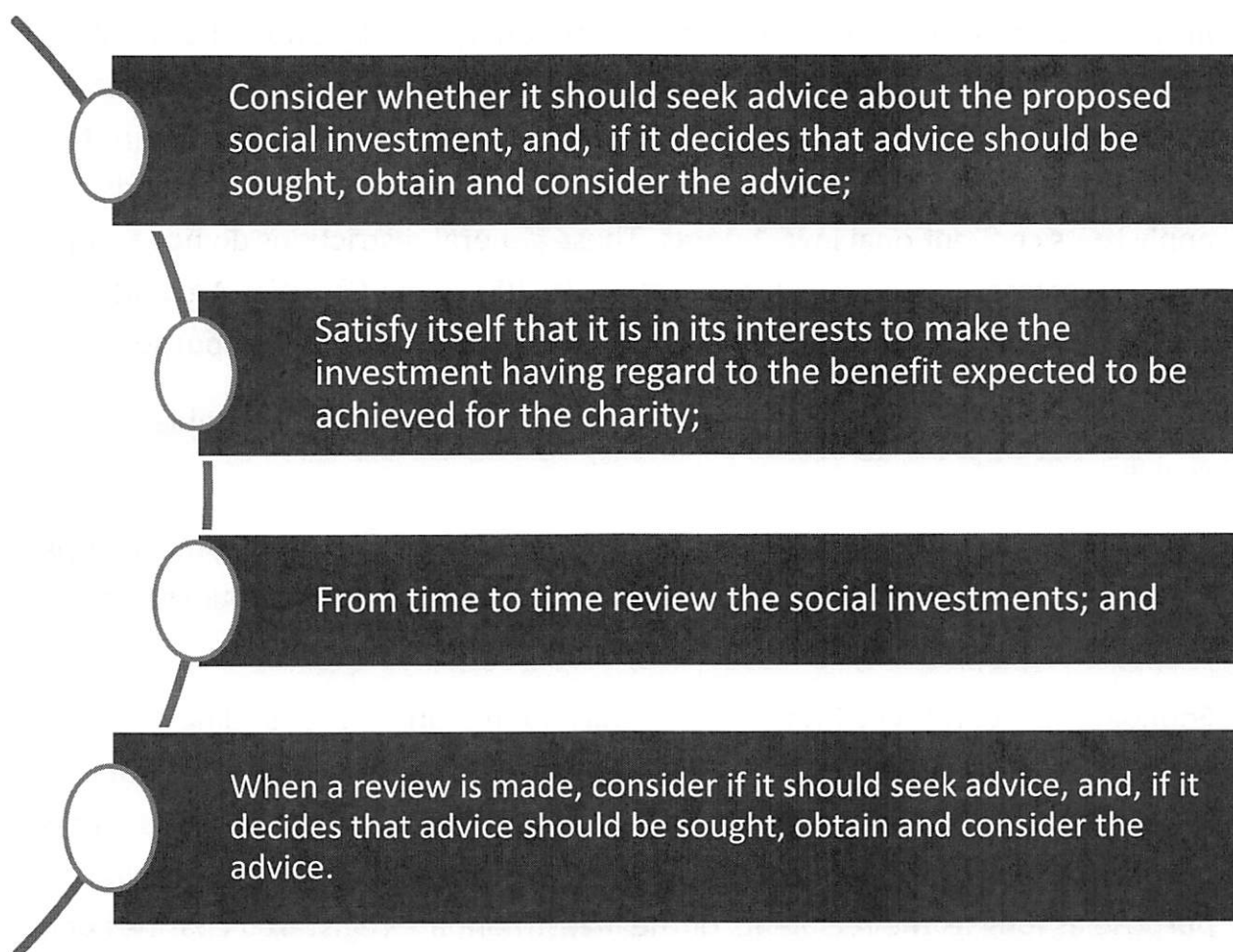
If a charitable organization which includes a foundation, is a registered charity established to benefit a particular purpose or a named charity, then the particular purpose or named charity must benefit from the social investment and the

recipients of the investment must be registered charities under the *Income Tax Act* (Canada).

Statutory Duties

(i) Specific Duties

Before making a social investment, a charity must comply with the following statutory duties:



These statutory duties cannot be restricted or excluded by a charity's governing documents.

(ii) Seeking Advice

Directors and trustees have a duty to consider if advice should be sought each time they consider a possible social investment.

When considering whether to seek advice, it is suggested that the charity review the following factors among others: the amount of risk involved; the impact on the charity if the social investment fails; the experience of the board members; the complexity of the proposed investment; the impact on the charity's reputation; and the effect on the charity's charitable registration, if applicable.

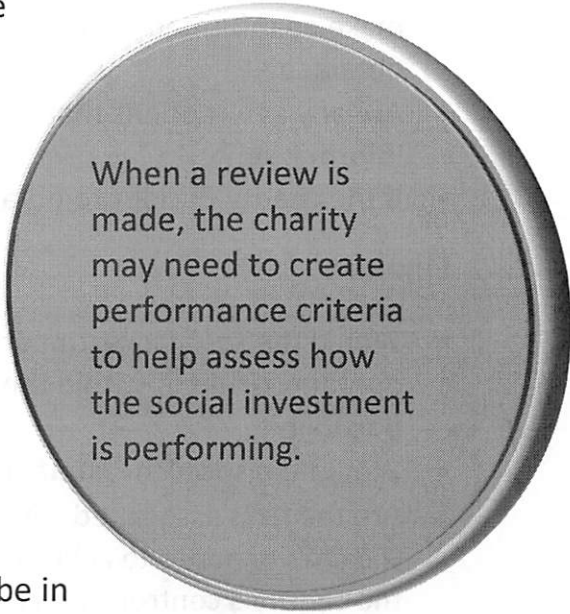
If the charity concludes that advice should be obtained, then the charity must obtain and consider the advice.

The charity should consider what kind of advice is needed and what professionals may be competent to provide such advice. It may be appropriate to consider whether advice should be sought from a lawyer, accountant, or other professional.

While the legislation does not require the advice to be in writing, it would be good practice to document any advice received.

Charities are required to review the social investments from time to time. How often a social investment should be reviewed is within the discretion of the directors or trustees and will depend upon the unique features of each social investment. It is suggested that the higher the degree of risk that attaches to a social investment, the more often the social investment should be reviewed.

A review of the social investment also requires that the charity consider if advice should be obtained. If a charity decides to obtain advice at this stage, then it must obtain and consider the advice.



When a review is made, the charity may need to create performance criteria to help assess how the social investment is performing.

(iii) Whether the Social Investment is in the Interests of the Charity

Fundamentally, charities should make sure they understand and are comfortable with all aspects of the transaction. They may need to dig deeper, test assumptions and ask questions about anything they don't understand. Some factors that might be considered are:

Information

- Does the charity have adequate information to enable the directors or trustees to make an informed decision? Is there relevant information that needs to be obtained?
- Are any assumptions that have been made reasonable and based on reliable information?
- If the charity decides to obtain advice, does the advisor have the relevant expertise?

Financial

- Would the social investment affect the charity's ability to carry out its current operations and fit within the charity's overall charitable activities and investment portfolio?
- Would the social investment fit within the short and long terms plans of the charity?
- Are the risks associated with the investment commensurate with the positive impact the charity hopes to achieve? Such risks could include: The number of factors beyond the charity's control; The amount of its funds that are at risk relative to the total assets of the charity; The impact on the charity should the investment fail or underperform;
- Will the costs of making the social investment impact the charity? These could include legal and financial costs; the possible loss of revenue compared to investing in a traditional investment; and possible income tax consequences;

Safeguards

- Are the risks associated with the investment substantial enough that the charity should consider putting safeguards in place to protect the investment?
- Can the investment be terminated on reasonable terms in the event the investment is no longer used to further the charity's purposes?
- Should the charity request up-dates on the investment throughout the investment period? If so, how often?
- Consider the period of time that the charity's funds would be locked-up and whether the funds may be withdrawn at a particular time; could this create cash flow problems? If so, what safeguards could alleviate the potential problem?

Reputation

- Would the investment fit within the expectations of donors to the charity and users of the charity's services?

Social investing will not necessarily be in off-the-shelf investments and assessing risk, liquidity and social return may be difficult. Therefore, depending on the complexity of the social investment and amount involved, it may be appropriate for charities to have a written plan.

General Fiduciary Obligations

The social investment provisions do not relieve directors and trustees of their general fiduciary obligations to the charity.

Directors and trustees must handle the charity's property with the care, skill and diligence that a prudent person would use. They must act in the best interests of the charity and treat the charity's property the way a careful person would treat their own property. They must always protect the charity's property from undue risk of loss and ensure that no excessive administrative expenses are incurred.

At their core, fiduciary obligations require that directors and trustees act honestly, in good faith and avoid situations where their personal interests conflict with their duties to the charity or to other parties. Charities must be careful that a member of their board does not have a personal interest in the business in which the charity is investing.

As directors or trustee are responsible for carrying out the charitable purposes, they should also oversee the decision to make the social investment and the monitoring of the investment.

For more information about fiduciary obligations, please see the Public Guardian and Trustees guidance, Duties, Responsibilities and Powers of Directors and Trustees of Charities, which can be found at

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charbullet/bullet3.php>

Permanent Endowment Funds

Charities sometimes hold funds on which donors have placed restrictions on the distribution of the principal or capital. In most of these cases, only the income earned by the fund may be expended on the charitable purposes. These funds are sometimes known as permanent endowment funds or perpetual charitable trusts, as the principal or capital of the fund is required to be held permanently by the charity.

Permanent endowment funds that restrict the expenditure of capital can be invested in social investments if: (i) The charity expects that the capital will be returned to the charity; or (ii) The document that created the endowment allows for such an investment.

Canada Revenue Agency

The Canada Revenue Agency does not recognize 'social investments' as a separate category of investment. Therefore, registered charity's making social investments must comply with both the provisions of the *Charities Accounting Act* and any CRA requirements that apply to the investment. Such requirements will differ based on whether CRA views the investment as a conventional investment, Program Related Investment (PRI) or program expenditure.

Many social investments may be viewed by CRA as a PRI, however, this is not necessarily the case for every social investment. It is recommended that registered charities that want to set up a social investment review CRA's requirements to ensure that the proposed investment qualifies either as a PRI, program expenditure or conventional investment.

For more information about PRIs, please contact CRA directly:

By telephone:
1-800-267-2384

By TTY service for people with a hearing or speech impairment:
1-800-665-0354

By mail:
Charities Directorate
Canada Revenue Agency
Ottawa ON K1A 0L5

<https://www.canada.ca/en/services/taxes/charities.html>

Further Information

For the most recent version of this Guidance, or for more information on charitable matters in Ontario, please visit the OPGT's webpage at:
<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities/>

You can also contact the Charitable Property Program of the Office of the Public Guardian and Trustee directly at:

Charitable Property Program

595 Bay Street, Suite 800, Toronto, ON, M5G 2M6
Tel.: (416) 326-1963 (please leave a message)
Toll-free: 1-800-366-0335 and then press 1, 3, 7
Fax: (416) 326-1969

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ONTARIO REGULATION 4/01 Section 2.1 "Authorization to Pay"

April 1, 2018

This Guidance provides general information and is not intended to be a substitute for legal advice. For legal advice, charities should consult their legal advisor.

This Guidance is dated and subject to amendment. To ensure access to the most recent edition, please visit the PGT webpage at:

<https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/charities/>



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Introduction

Ontario Regulation 4.01 under the *Charities Accounting Act* (the Regulation), allows charitable corporations^[1] operating in Ontario to compensate directors and persons connected to them, without a court order, provided specific requirements are met.

Before this Regulation, directors were prohibited from receiving any payment or other personal benefit from a charitable corporation without a court order^[2]. This applied even if the goods or services were provided at less than fair market rates. Under the Regulation, a court order is no longer necessary for certain payments, provided the requirements of the Regulation are met.

If a charitable corporation wishes to make a payment which is not authorized under the Regulation, a court order is required. In cases where all parties consent, a Court order may be obtained through an application to the Office of the Public Guardian and Trustee under s.13 of the *Charities Accounting Act* (see section 17, below).

This guidance and the process for approving certain payments to directors under section 2.1 of the Regulation do not apply to the purchase of indemnity insurance. For the purchase of indemnity insurance, see section 2 of the Regulation here: <https://www.ontario.ca/laws/regulation/010004Reg.4/01>.

The Regulation does not apply to reimbursement of reasonable expenses of a director. Generally, expenses can be reimbursed if they were incurred to carry out the charitable purposes, the amount is reasonable, and proper receipts are provided.

Subsection (6)(c) of the Regulation requires charitable corporations to consider this guidance when approving payments to directors or connected persons.

What payments can and cannot be made under this regulation?

The short answer

The Regulation can be used to authorize payments for most goods, services and facilities, provided all the requirements are met. It does not authorize payments for services provided by a director in their capacity as a director or employee, or for fundraising or real property transactions.

A more detailed answer

Examples of goods, services and facilities that may be provided by a director or connected person include, but are not limited to:

- The delivery of a lecture;
- Occasional professional services and consultations, except where prohibited by statute or rules of professional conduct;
- A piece of research;
- A contract to provide maintenance work;
- Rental of space.

The Regulation does not authorize a charitable corporation to:

- Make payments for services provided by a director in their capacity as a director. Directors of charities have a duty to act gratuitously. This means they are not permitted to be paid for their services as a director; or
- Pay directors or connected persons as employees, or for fundraising services or real property transactions. The charitable corporation would require a Court order to make such payments to a director or connected person.

What is a conflict of interest and why is it important?

A conflict of interest arises when a director has a personal interest in the result of a decision made by the charitable corporation. Directors of charities have a fiduciary duty to avoid both a conflict of interest and the appearance of a conflict of interest. Directors must always make decisions in the interests of the charitable corporation and not allow their personal interests or preferences to affect their conduct and decisions.

Payment from a charitable corporation to a director or a connected person for goods, services, or facilities represents a personal benefit to the director and places them in a conflict of interest. The Court has allowed payments only in situations where, at the time the decision is made, it is in the best interest of the charitable corporation. The Regulation is intended to provide the necessary approval without having to obtain a Court order.

What is a 'charitable corporation'?

A charitable corporation for the purposes of this guidance is any non-share capital (not-for-profit) corporation operating in Ontario that is a registered charity or has exclusively charitable purposes. It does not include trustees of charitable trusts or non-incorporated charitable organizations and, therefore, those organizations cannot use the Regulation to pay trustees. The Regulation uses the term 'corporate trustee' to be consistent with other provisions within the *Charities Accounting Act*. Within this guidance, 'charitable corporation' is used in place of 'corporate trustee'.

What is a 'connected person'?

A 'connected person' is a 'person connected to a director' of the charitable corporation. The Regulation identifies the following individuals and businesses as 'connected persons':

1. Family members, including: spouse, child, parent, grandparent or sibling of the director;
2. The employer of the director or of a family member;
3. A corporation with share capital, if, singly or jointly, the director or a family member beneficially owns, controls or has direction over more than 5 per cent of the corporation's shares;
4. A corporation without share capital, if singly or jointly, the director or a family member beneficially owns, controls or has direction over more than 20 per cent of the outstanding voting

membership interests of the corporation;

5. A corporation with or without share capital for which the director or a family member acts as director or officer;
6. A partnership in which the director or a family member is a partner, or in which a corporation described in paragraph 3, 4 or 5 is a partner;
7. A partner in a partnership described in paragraph 6.

Who may use this Regulation?

The Regulation may be used by charitable corporations that have four or more directors who are eligible to vote on the payment to the director connected person. This means that charitable corporations must have at least five directors, four of whom are eligible to vote on the matter. See #13, 'Who is eligible to participate in the meeting and vote on the matter?' below for further information on who can make the decision to make a payment.

The Regulation cannot authorize payments that are otherwise prohibited by the charitable corporation's governing documents^[3]. Directors of the charitable corporation should review the governing documents prior to authorizing a payment.

In addition, the Regulation cannot authorize payments that are otherwise prohibited by statutes applicable to the charitable corporation or rules professional of conduct applicable to the director. For example, s.95 (1) of the *Corporations Act* and 180(2) of the *Canada-Not-for-Profit Corporations Act*, each prohibit a director from serving as an auditor for the charitable corporation.

If the charitable corporation is a registered charity, directors may wish to review the rules regarding their particular situation with the Canada Revenue Agency, as the applicable requirements under the *Income Tax Act* may differ.

What conditions must be met before authorizing a payment or paying a director or connected person?

- At the time the payment is authorized, the board must believe that it is in the charitable corporation's best interests (see #8 below);
- The payment must be in an amount that is reasonable for the charitable corporation to pay for the goods, services or facilities that are provided (see #9 below);
- The payment must not result in the amount of the charitable corporation's debts and liabilities exceeding the charitable property's value, or render the charitable corporation insolvent;
- Every director of the charitable corporation and, when applicable, the connected person, must agree in writing to a maximum amount that can be paid by the charitable corporation for the goods, services or facilities (see #10 below);
- If the goods, services or facilities are to be provided by a connected person to a director, that person must also agree in writing to the maximum amount;
- Every director of the charitable corporation, other than the director providing the goods, services or facilities or the director to whom the person providing the goods, services or facilities is connected, as the case may be, must agree in writing that he or she is satisfied that the payment is being made in accordance with the requirements, and within the restrictions, of the Regulation;
- The payment cannot exceed the maximum amount indicated within the agreement, unless the agreement has been amended (see #11 below); and,
- The board of directors must consider any guidance respecting payments made under this section that is issued by the Public Guardian and Trustee and published on a Government of Ontario website.

How do directors decide that the payment is in the best interest of the charitable corporation?

Before making a payment, the board of directors must believe that the arrangement is in the best interests of the charitable corporation. The directors must be able to show that:

- The good, service or facility is would be beneficial to the charitable corporation;
- There is a contemplated advantage to the charitable corporation in using one of its directors or a connected person instead of someone else. This may involve a financial advantage, or there may be other advantages, such as the experience of the director or their knowledge of the charity.

The board of directors should consider the following:

- Is the director or connected person sufficiently experienced and skilled or qualified to provide the good or service?
- Is there likely to be an adverse impact on the charitable corporation's reputation or levels of support and funding?
- Can the charitable corporation afford the cost of the goods, services or facilities without any adverse impact on its activities?
- Would the director's or connected person's inside knowledge of the charitable corporation and its working environment be beneficial to the charitable corporation? A Board may decide that for less - or no more - than the market price, it can use the skills of a director or connected person who knows the specific requirements of the charitable corporation, and is competent to do the work in question; and,
- If there is no benefit from obtaining the good, service or facility from the director or connected person (that is, no financial or other benefit), the charitable corporation should obtain the good, service or facility from an independent party.

What constitutes a 'reasonable' payment?

When considering whether a payment is reasonable, charitable corporations should consider:

- The market price for similar goods, services or facilities in similar circumstances;
- The value to the charitable corporation of the goods, services or facilities provided by the director or connected person;
- The quality of the goods, services or facilities and the reliability of the supplier;
- Costs that may have been previously paid by the charitable corporation in obtaining those goods, services or facilities;
- The implications for the reputation of the charitable corporation with its donors, funders, members and supporters, and with the general public.

Other factors to consider:

- When the charitable corporation does not have information on the market price for services,

they may obtain quotations from other suppliers, unless the amounts involved are minor. Proper records should be kept of these, and of any other information used in making comparisons. Generally, the higher the payment, the more the charitable corporation needs to be able to show they have considered the market price;

- Where the charitable corporation has a policy on procurement and purchasing, the charitable corporation should ensure it complies with its terms when authorizing payments to a director or connected person;
- Charitable corporations should ensure a proper record is kept of the basis for their decision, including why the level of payment is considered reasonable – which should include reference to payments in similar situations.

What is the maximum amount?

The 'maximum amount' is the total amount that the charitable corporation has agreed to pay for provision of the goods, services or facilities. The total amount paid at the end of the contract may be less than the maximum amount; for example, if the contract includes an hourly rate and the actual hours required to fulfil the contract were less than anticipated.

Can the agreement be amended?

Yes, however, in order to authorize a payment above the maximum amount within the original agreement, the charitable corporation must again satisfy the requirements under subsections (5) – (10) of the Regulation.

How does the Board show compliance with the requirements?

In addition to maintaining a copy of the agreement and the required approvals, the Board should fully document the decision making process, including market research, review of this guidance, and the rationale for its decision.

Who is not eligible to participate in the meeting and vote on the matter?

The following individuals are not eligible to participate in the meeting and vote on the matter:

1. any director receiving a payment;
2. any director connected to the person receiving the payment;
3. any person connected to the director in (a) or (b) above.

The Regulation requires the charitable corporation to have at least four eligible voters in order to authorize the payment. It is important that the Board ensures that the ineligible director and any connected person are excluded from the meeting. Any meetings which require the director, or the connected person, to be in attendance should be completed prior to the meeting where the final discussion and decision of the eligible directors is to take place.

How many directors or connected persons can be paid at any one time?

The total number of persons receiving payment under the Regulation must not exceed 20% of the number of voting directors serving on the Board.

Is financial disclosure required?

The short answer

Yes, the Regulation requires disclosure of the payment to the members of the charitable corporation, both at the annual members meeting and within the annual financial statements. The Regulation does not specify what information is to be disclosed or in what manner, however, disclosure should meet relevant accounting practices.

In more detail

Financial disclosure is necessary to ensure transparency between the directors and the membership. The membership, which is usually responsible to elect directors, is best positioned to hold them accountable for the administration of the charitable corporation.

The PGT guidelines with respect to disclosure within the financial statements are:

- The information should appear in the notes to the financial statements;
- The director in question should be named;
- If someone connected to a director contracts with the charitable corporation, it is not necessary to name the connected person, i.e., the notes could say, a party connected to the named director;
- The nature of the business transaction should be mentioned in broad terms, i.e., whether it is for a good, service, or facility that was provided; and,
- It is not necessary to specify the amount paid to the director or the connected person.

Examples:

- The corporation contracted with [name of Director], a director of the corporation, for services provided to the corporation;
- The corporation contracted with a person connected to [name of Director], a director of the charitable corporation, for the purchase of goods;
- The corporation contracted with a company connected to [name of Director], a director of the corporation, for the use of facilities.

Are there any circumstances in which some of the requirements may be waived?

The short answer

Yes, if the charitable corporation is making a payment to another not-for-profit corporation or a for-profit corporation that it wholly owns **and** the payment does not benefit the director who is connected to the corporation, the requirements are reduced.

A more detailed answer

Most of the requirements are waived, including the necessity of having at least 4 directors who are eligible to vote. The only requirements to be met are:

- The payment cannot be made for fundraising services or transactions related to the purchase or sale of real property;
- The payment must be made with a view to the charitable corporation's best interests; and,
- The payment must be in an amount that is reasonable for the charitable corporation to pay for the goods, services or facilities that are provided.

As an example:

ABC Foundation (the Foundation) is a charitable corporation established for the purposes of raising, maintaining and disbursing funds for the benefit of ABC Charity (the Charity). The Chief Administrator of the Charity serves as a director of the Foundation by virtue of occupying the office of Chief Administrator.

In order to minimize costs, the Foundation wishes to contract with the Charity for office space and certain administrative services. As the Charity is the employer of a director of the Foundation, the Charity is a 'connected person' to that director.

Normally, in order for the Charity to contract with the Foundation, all of the requirements of the Regulation would need to be fulfilled. However, as the Foundation is a charitable corporation and no benefit would be received by the Chief Administrator/Director as a result of the transaction, the Regulation relieves the Foundation of some of the requirements.

In this example, the directors would need to ensure that the payment was made in the best interest of the Foundation and was reasonable, but the other requirements need not be met.

What if a charitable corporation wants to authorize a payment but cannot meet the requirements?

The short answer

If a court order would have been required before this Regulation was made, and the payment is not authorized under the Regulation, the charitable corporation would still require a court order to make the payment.

A more detailed answer

The Regulation does not establish new restrictions on the ability of directors to receive a personal benefit under Ontario common-law. Rather, it provides a mechanism to allow charitable corporations to provide a benefit that would have required a court order before the Regulation. In situations where the requirements of the Regulation cannot be met, the charitable corporation would still need a Court order to make the payment.

As an example, in some religious organizations, it is important for the religious leader to also sit on the board of directors. The Regulation would not apply to this situation as the religious leader is an employee of the charitable corporation. In this circumstance, a court order would be required to pay the religious leader.

Where the common law requires a court order to make a payment and where the Regulation does not authorize the payment, a court order may, in certain circumstances, be issued under s.13 of the *Charities Accounting Act*. For more information on s.13 orders, please see the OPGT's publication "How to get a Court Order on a Charitable matter Without Going to Court", available on the OPGT's webpage. See #19 "Further Information", below, for the web-page address.

What is the risk for Directors who make payments to a director without complying with the requirements of the Regulation?

Directors of charitable corporations who fail to comply with the requirements in the Regulation could be in breach of their fiduciary duties and possibly liable to re-pay funds. Complaints about payments to a director or a person connected to a director would ordinarily be answered if the charitable corporation can show that it complied with the Regulation.

Further Information

Ontario statute law can be found at: <https://www.ontario.ca/laws>

Federal statute law can be found at: <http://laws-lois.justice.gc.ca/eng/acts/l.html>

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Charitable Property Program

595 Bay Street, Suite 800, Toronto, ON, M5G 2M6

Tel.: (416) 326-1963 (please leave a message)

Toll-free: 1-800-366-0335 and then press 1, 3, 7

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[1] A charitable corporation refers to a charity incorporated under the Ontario *Corporations Act*, the *Canada Not-for-Profit Corporations Act*, or some other provincial corporate legislation. The term is distinct from the Canada Revenue Agency's use of the terms charitable organization or foundation under the *Income Tax Act*.

[2] *Re Public Trustee and Toronto Humane Society et al.*, [1987] O.J. No. 534, 60 O.R. (2d) 236, 40 D.L.R. (4th) 111, 27 E.T.R. 40, 4 A.C.W.S. (3d) 446.

[3] For the purposes of the Guidance, governing documents includes Articles of Incorporation, Articles of Continuance, Articles of Amendment, Letter's Patent, Supplementary Letter's Patent, or the special Act creating the charitable corporation, and the corporation's by-laws.